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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964.

THE PURDY COMPANY,
Petitioner-Appellant Below,

vs.

ARGENTINA, a foreign state, and DIRECCION GENERAL FABRICACIONES MILITARES OF ARGENTINA,
Respondents-Appellees Below.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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INDEX

	PAGE
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Constitutional and Statutory Law Involved	3
Statement of the Case	3
Basis for Federal Jurisdiction	6
Reasons for Granting the Writ	7
I. The Recent Recognition by the Department of State of the Need to Allow Suits Against Foreign Sovereigns (the Tate Letter Policy) Has Been Frustrated by the Decision Below	7
II. The Decision of the Court Below Is in Conflict With Decisions of This Court	12
III. The Decision of the Court Below Is Not Supported by Authorities	15
IV. This Important Area of Federal Law Is in Need of Immediate Supervision and Clarification by This Court	18
V. The Decision of the Court of Appeals Is in Conflict With the Illinois Authorities	18
Conclusion	19

TABLE OF AUTHORITIES

CASES

Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964) 12-13

Clearfield Trust Co. v. U.S., 318 U.S. 363 (1943) 13

Et Ve Balek Kurumu v. B. N. S. International Sales Corp., 25 Misc. 2d 299, 204 N.Y. Supp. 2d 971 (S.C. Spec. Term. N.Y. Co., 1960) aff'd Unam. Memo. dec. 233 N.Y. Supp. 2d 1013 (S.C. App. Div. 1962) 8

PAGE

Gray v. American Radiator & Sanitary Corp., 22 Ill. 2d 429, 176 N.E.2d 761 (1961) 19

Hansen v. Denckle, 357 U.S. 235 (1957) 19

Hinderlider v. La Platta River Co., 304 U.S. 92, 110 (1937) 13

In re Herman's Estate, 159 Minn. 274, 198 N.W. 1001 (1924) 16

Mirabella v. Banko Industrial de la Republica Argentina, 237 N.Y. Supp. 2d 499 (S.C. Spec. Term N.Y. Co. 1963) 8

National City Bank of New York v. Republic of China, 348 U.S. 356 (1955) 8

New York & Cuba Mail Steamship Co. v. Republic of Korea, 132 F. Supp. 684 (S.D.N.Y. 1955) 11

Oster v. Dominion of Canada, 144 F. Supp. 746 (N.D. N.Y. 1956); aff'd per curiam 238 F.2d 400, cert. den. 353 U.S. 936 ..... 15, 16

Pacific Molasses Co. v. Comite de Ventas de Mieles de la Republica Dominicana, 30 Misc. 2d 560, 219 N.Y. Supp. 2d 1018 (S.C. Sp. Term 1961) 8

Republic of Mexico v. Hoffman, 324 U.S. 30 (1945) 8

Stephen v. Zivnostenska Banka National Corp., 222 N.Y. Supp. 2d 128, 15 App. Div. 2d 11 (S.C. App. Div. 1961) 7

The Anne, 3 Wheat 434 (1818) 16

Three Star Trading Co. v. Republic of Cuba, 222 N.Y. Supp. 2d 675 (S.C. Spec. Term N.Y. Co. 1961) 8

U.S. v. Harris & Co. Advertising, Inc., 149 So. 2d 384 (Dist. Ct. App., Fla. 1963) 14

U.S. v. Pink, 315 U.S. 203 (1941) 13

PAGE

CONSTITUTION AND STATUTES

U.S. Const. Article VI, cl. 2 .....3, 13
Ill. Rev. Stats., Ch. 110, Sec. 17(1)(a) (1964) 3, 19
Rule 4(e)(2) Fed. R. Civ. P. (1964) 12
Tate Letter, 20 Dept. State Bull. 984 (1952) .....
.....3, 7, 9, 11, 18, 8a-11a

MISCELLANEOUS

Developments in the Law, State Court Jurisdiction, 73 Harv. L. Rev. 909, 950 (1960) 11
Friendly, In Praise of Erie—and the New Federal Common Law, 19 Record of N.Y.C.B.A. 64 (1964) .. 13
Griffin, Adjective Law & Practice in Suits Against Foreign Governments, 36 Temple L. Q. 1 (1962) ....
.....9-10, 11, 12, 17
Henkin, The Foreign Affairs Power of the Federal Courts; Sabbatino, 64 Colum. L. R. 805 (1964) 13
Jenner & Tone, Historical & Practice Notes to the Illinois Civil Practice Act, Smith-Hurd Ill. Annot. Stats., Chp. 110 following Sec. 17 (1956) and (1962 Supp.) p. 18 19
Keefe, International Conflicts of Laws, 50 A.B.A.J. 593 (1964) 13
Lee, Consular Law & Practice, N.Y. (1961), 59 16
Leonard, The United States as a Litigant in Foreign Courts, 1958 Proc. Am. Soc. Int. Law 95, 98 (April 1958) 14
2 Moore, Fed. Practice Par. 4.19, pp. 1078-1079 (1964) 12
Niekuss, Comments — International Law — Sovereign Immunity—The First Decade of the Tate Letter Policy, 60 Mich. L. Rev. 1142 (1962) 15, 17
Proposed official draft, Restatement of the Foreign Relations Law of the United States, Sec. 72 (1962) .. 8
Timberg, Sovereign Immunity—State Trading—and Self Deception, 56 N.W.L. Rev. 109 (1961) 10

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No.

THE PURDY COMPANY,

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vs.

ARGENTINA, a foreign state, and DIRECCION GENERAL FABRICACIONES MILITARES OF ARGENTINA,

Respondents-Appellees Below.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

To The Honorable The Chief Justice And The Associate Justices Of The Supreme Court Of The United States:

Petitioner, The Purdy Company, respectfully prays for the issuance of a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit, entered on June 11, 1964.

OPINION BELOW.

The decisions of the United States District Court for the Northern District of Illinois, Eastern Division, vacating a default judgment entered against Argentina and dismissing Argentina and Direccion General De Fabricaciones

Militares Of Argentina (hereinafter referred to as "DGFM") are unreported. Copies of the Orders are found at pages 26 and 37 of the Joint Appendix. (JA 26, 37). The decision of the United States Court of Appeals for the Seventh Circuit is reported at 333 F. 2d 95 (7 Cir., 1964).

JURISDICTION.

The judgment of the Court of Appeals was entered on June 11, 1964. Rehearing was denied on July 14, 1964. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED.

1. Pursuant to the policy of the United States Department of State to allow suits against foreign governments acting in their commercial capacity, is a foreign government and its department amenable to suit in a Federal Court of the United States for its breach of a commercial contract?

2. Are the federal courts competent to hear a suit against a foreign government in a commercial action when *in personam* jurisdiction was sought by service of process upon the Argentine Counsul in Chicago, who is the commercial representative of his government, and when that Consul rendered continuous and continuing services which were a required condition precedent to performance of the particular commercial contract sued upon?

3. Is a foreign defendant who entered into a contract with an Illinois corporation calling for final payment in Illinois by means of a letter of credit, adopting all of the terms of the underlying contract, established by the respondent upon an Illinois bank and whose representatives rendered final approval in Illinois subject to the jurisdiction of the Illinois courts?

CONSTITUTIONAL AND STATUTORY LAW INVOLVED.

Article VI, Clause 2, Constitution of the United States:

> "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

The *Tate Letter*, 20 Dept. of State Bull., 984 (1952), (See Appendix pp. 10-13a) for text.

Chapter 110, Ill. Rev. Stats., Sec. 17(1)(a) (1964):

> "Any person, whether or not a citizen or resident of this State, who in person or through an agent does any of the acts hereinafter enumerated, thereby submits said person and, if an individual, his personal representative, to the jurisdiction of the courts of this State as to any cause of action arising from the doing of any of said acts;
>
> "(a) the transaction of any business within this State;"

STATEMENT OF THE CASE.

This is an action brought by petitioner, The Purdy Company, to recover the balance of the consideration due and owing from respondents, Argentina and DGFM, pursuant to the terms of a commercial contracts under which petitioner commercially sold and delivered steel to respondents.

The facts are undisputed. On or about November 14, 1955, petitioner, The Purdy Company, entered into a commercial contract for the sale of steel to defendants DGFM

and Argentina by and through its department DGFM. (JA 15) The contract required respondents to establish an irrevocable letter of credit in favor of the petitioner upon The First National Bank of Chicago, Chicago, Illinois, as a necessary condition precedent to the shipment of steel. (JA 15)

Payment was to be made in American dollars (JA 16) to the petitioner at Chicago by means of respondent's letter of credit. (JA 17) Another required condition precedent was that the Argentine Consul duly legalize and approve invoices and other documents that petitioner had to submit to him before payment could be made. (JA 17) Pursuant to respondents' requirements, documents were submitted to the Argentine Consul in Chicago at the Consulate in Chicago, Illinois. (JA 35) At a continuous series of at least ten separate meetings between the Argentine Consul and petitioner's representative in Chicago (JA 35) the Consul would inspect the documents that the contract required to have consular approval and imprimatur. (JA 35) The Argentine Consul would approve and certify these documents. On occasion, finding the papers unsatisfactory, the Consul would refuse approval until the modifications he required were completed. (JA 35-36) After the documents had been approved the Argentine Consul in Chicago would retain and forward them to the appropriate authorities. (JA 36) Only after approval by the Argentine Consul would The First National Bank of Chicago make partial payments to the plaintiff pursuant to the credit established by the respondents. (JA 36) Despite the complete performance of all of the terms by the petitioner, and despite the fact that delivery was made to and accepted by respondents, they have wrongfully refused to fulfill their commercial contractual obligations and have wrongfully refused to pay the bal-

ance of $58,997.63 owing under the contract and the $27,912.14 demurrage due petitioner.

At the inception of this action, service on both defendants was made upon the Argentine Consul in Chicago who acted under the contract. (JA 9) No answer was ever filed by either respondent. Instead, a letter from the Argentine Minister was received by the District Court on February 14, 1961 (almost four months after defendants were in default for failure to answer). In this letter certain questions about the sufficiency of process were raised although the Argentine Minister readily admitted that the Argentine Consul in Chicago had "notified me opportunely of the complaint filed in this action". (JA 10)

On March 8, 1961, a motion on behalf of DGFM to quash service of process upon the Argentine Consul as to it was sustained. The court authorized the issuance of an alias service of summons upon that defendant. (JA 22, 23) Alias service of summons was served by delivering a summons and complaint to a duly authorized agent of respondent, DGFM, at its home offices in Buenos Aires pursuant to 110 Ill. Rev. Stats., Sec. 17(a), (JA 24, 25). Defendant DGFM's motion to quash this alias service was granted. (JA 27)

Throughout the entire proceedings Argentina had filed no appearance or answer and was, therefore, in default. On September 12, 1963, the District Court, despite various "suggestions" filed by Argentina, (JA 43, 44, and 46) found that "Summons and Complaint having heretofore been personally served on said defendant", directed that default judgment in the amount of Eighty-Six Thousand Nine Hundred Nine and 77/100ths Dollars ($86,909.77) be entered against Argentina. (JA 31, 32)

Thereafter, Argentina finally filed what it termed a "special appearance" and on its motion the District Court vacated the default, quashed service of summons, and dismissed this action. (JA 37, 38)

BASIS FOR FEDERAL JURISDICTION.

The jurisdiction of the federal court in this matter is authorized pursuant to 28 U.S.C., Sec. 1332(2), specifically providing for actions brought by a citizen of a state against foreign states and subjects thereof.

REASONS FOR GRANTING THE WRIT.

I.

THE RECENT RECOGNITION BY THE DEPARTMENT OF STATE OF THE NEED TO ALLOW SUITS AGAINST FOREIGN SOVEREIGNS (THE TATE LETTER POLICY) HAS BEEN FRUSTRATED BY THE DECISION BELOW.

It is clear and beyond dispute that the present and modern scope of United States' policy concerning sovereign immunity now allows foreign governments to be sued without consent for breaches of commercial obligations. This policy has been well established by the Department of State in the famous *Tate Letter*, 26 Dept. State Bull. 984, 985 (1952) (App. 10a-13a):

> "The department has now reached the conclusion that such immunity should no longer be granted in certain types of cases.
>
> • • •
>
> "Finally, the Department feels that *the wide spread and increasing practice on the part of governments of engaging in commercial activities makes necessary a practice which will enable persons doing business with them to have their rights determined in the courts.* For these reasons it will hereafter be the department's policy to follow the restrictive theory of Sovereign Immunity in the consideration of requests of foreign government for a grant of Sovereign Immunity." (Emphasis added.)

See also, *Stephen* v. *Zivnostenska Bank National Corp.*, 222 N.Y. Supp. 2d 128, 133; 15 App. Div. 2d 11 (S.C., App. Div. 1961) where, in a letter, the Department of State reiterated that there was no immunity for a sovereign's

commercial acts, and that it was appropriate for the Court to hear the suit.

Since the issue of allowing suits to proceed against foreign sovereigns is primarily a political question involving foreign policy conducted *solely* by the federal government, this Court had held that the policy of the Department of State is entitled to great weight. *National City Bank of New York* v. *Republic of China*, 348 U. S. 356, 360 (1955); and *Republic of Mexico* v. *Hoffman*, 324 U. S. 30, 36 (1945).

Despite respondents' request (JA 10), the Department of State has *not* suggested that they are entitled to immunity for consequences of their commercial activities (Opinion, p. 3, f.n. 2, 333 Fed. 2d 95, 97, f.n. 2). This position is entirely in accord with the Department's restrictive policy of sovereign immunity.

Pursuant to the Department of State's position the courts have unanimously held that foreign sovereigns are amenable to suit for their breach of commercial transactions. In *Et Ve Balck Kurumu* v. *B.N.S. International Sales Corp.*, 25 Misc. 2d 299, 204 N.Y. Supp. 2d 971, 976-977 (S. C. Spec. Term N. Y. County, 1960) *aff'd* Unam. Memo Dec. 233 N. Y. Supp. 2d 1013 (S. C. App. Div. 1962) it was held that the sale of meat to the Turkish Army was a commercial activity for which suit could be brought. See also Proposed Official Draft, *Restatement of the Foreign Relations Law of the United States*, Sec. 72 (1962), *Pacific Molasses Company* v. *Comite de Ventas de Miles de la Republica Dominicana*, 30 Misc. 2d 560, 219 N. Y. Supp. 2d 1018 (Sup. Ct. Term, N. Y. County 1961); *Three Star Trading Co.* v. *Republic of Cuba*, 222 N. Y. Supp. 2d 675 (Sup. Ct. Special Term N. Y. County 1961); *Mirabella* v. *Banka Industrial de La Republica Argentina*, 237 N. Y.

Supp. 2d 499 (Sup. Ct. Special Term, N. Y. County 1963), all allowing suit in commercial activities.

The doctrine of allowing suits against foreign sovereigns, an imporant innovation in our foreign policy, was necessitated by the "widespread and increasing practice" of foreign commercial dealings. Tate Letter (App. 13a). The *Tate Letter* represents a policy designed to give protection to the ever-increasing number of domestic enterprises now engaging in commercial dealings with foreign sovereigns without sacrificing uniformity in foreign relations.

It is clear, however, that to effectuate the Department of State's policy protecting domestic enterprises there must be some way to bring a foreign sovereign into court. There can be no suits if service of process is impossible. This interrelationship of restrictive immunity and the need for methods of service of process is succinctly stated by Dean Griffin, a former attorney in the office of the Legal Advisor to the Department of State, in *Adjective Law and Practice in Suits Against Foreign Governments*, 36 Temple L. Q., 1, 5, [1962]:

> "Removal of the absolute doctrine as a barrier to suit means that the necessity of obtaining jurisdiction . . . will arise in every such case. Therefore, unless a foreign government engaging in *jure gestionis* activities voluntarily submits to the jurisdiction of local courts, the only alternative to frustration of the restrictive doctrine is to submit such government to local procedures for obtaining jurisdiction.
>
> "*Moreover, the restrictive doctrine itself seems to contemplate the subjection of foreign governments to local rules for obtaining jurisdiction.* The rationale of the restrictive doctrine is that a government engaging in activities open to private persons submits itself in foreign territory to the same rules

that there govern relations among private persons. Surely such local rules include not only those governing substantive legal liability but also the rules of adjective law which are prerequisite to legal power to render judgment on the merits." (Emphasis added.)

To say that a foreign government is subject to suit but at the same time to hold there is no way to obtain jurisdiction without their consent (as respondents repeatedly urged below[1]) is simply to rephrase and revitalize the repudiated doctrine of absolute immunity in different language.

Yet, the decision of the Court of Appeals has done just that. It is virtually impossible under its decision for private corporations having commercial dealings with foreign sovereigns to obtain redress in the courts. The right to sue is left without remedy.

Apparently recognizing the grave difficulties created by holding no *in personam* jurisdiction permissible, the Court attempted to mitigate the harshness of the decision

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[1] The only authority respondents cited for this novel position is a brief filed by the Department of Justice in *Hellenic Lines, Ltd.*, v. *Luke C. Moore*, No. 18,265 (D.C., Cit. 1964) where at page 22 they state the policy of restrictive immunity is "illusory" because of the impossibility of obtaining jurisdiction. Far from representing the government position, the Department of Justice, merely a party litigant in *Moore*, completely opposes the Department of State's rejection of this outmoded doctrine, as noted in Timberg, *Sovereign Immunity, State Trading and Self Deception*, 56 Nw. L. Rev. 109, 124 (1961): "The Justice Department has a predilection for the doctrine of absolute sovereign immunity, and in effect becomes *amicus curiae* for foreign governmental agencies or corporations pleading sovereign immunity as a defense to a contract or tort action." Even as an independent grounds, this Court should grant the writ to resolve the conflicting policies of the Departments of Justice and State.

by suggesting two alternative methods of suit (Opinion, page 3, 333 F. 2d 97).

The Court first suggested that jurisdiction could be obtained if the foreign sovereign were to bring an action in which a counterclaim might be filed. However, in all situations under the Tate Letter it is the *foreign sovereign that has breached the contract.* There is little reason to expect the party in default to bring suit. The purpose of the *Tate Letter* was to allow the aggrieved party to sue and not wait upon the pleasure of the defaulting government. No jurisdiction is obtainable under this alternative.

The Court also suggested that *in rem* or *quasi in rem* jurisdiction might alleviate the dilemma. Following the pronunciation of the *Tate Letter* (including when petitioner brought suit), the Department of State adhered to the position that attachment of property to obtain jurisdiction (the only method to bring an *in rem* action. *Developments in the Law. State Court Jurisdiction.* 73 Harv L. Rev. 909, 950) was not allowed. E.g. *New York & Cuba Mail Steamship Company* v. *Republic of Korea.* 132 F. Supp. 684 (S. D., N. Y. 1955). Since the Department of State maintained both the position that suits were allowable against foreign sovereigns, but that attachment was not an acceptable method, the intent of the Department of State must be to allow *in personam* jurisdiction. Dean Griffin has concluded "There can be no such practice [suits in commercial cases] until it is possible to obtain jurisdiction over foreign governments by *service of process.*" Griffin. *Adjective Law and Practice in Suits Against Foreign Governments.* 36 Temple L. Q. 1, 14 [1962] (Emphasis added.)

Petitioner prays that this Court grant the writ so that the Decision below, which leaves no effective means to

obtain jurisdiction against foreign governments and frustrates the policy of the Department of State, may be reviewed.

II.

THE DECISION OF THE COURT BELOW IS IN CONFLICT WITH DECISIONS OF THIS COURT.

The Court of Appeals predicated its refusal to allow *in personam* jurisdiction against foreign governments on the assumption that *in rem* jurisdiction is obtainable. (Opinion, page 3, 333 F2d 95, 97). Not only does that position frustrate the intent of the Department of State but it also directly conflicts with holdings of this Court.

In rem jurisdiction arises *solely* as a matter of *state* law. There is no independent federal *in rem* jurisdiction, 2 Moore, *Fed. Practice* par. 4.19, pages 1078-1079 (1964). While it is true that under the 1963 Amendments to Rule 4(e) (2) Fed. R. Civ. P., *in rem* actions may be initiated in federal courts, those preceding can only be made "Whenever a statute or rule of control of the *State*" provides. *In rem* jurisdiction can only be made pursuant to *State* rules. Griffin, *Adjective Law and Practice in Suits Against Foreign Governments,* 36 Temple L. Q. 1, 7 (1962). There is no independent federal means. The Court of Appeals is thus holding that foreign states are suable only under *state* law.

Yet this Court has held in clear and unequivocal language that suits against foreign states are *exclusively* matters of *federal law. Banco Nacional de Cuba* v. *Sabbatino,* 376 U. S. 398, 425 (1964).

> "However, we are constrained to make it clear that an issue concerned with a basis choice regarding the competence and function of the judiciary and National Executive *in ordering our relationship with*

> *other members of the international community must be treated exclusively as an aspect of federal law.*
>
> "[R]ules of international *law should not be left to divergent and perhaps parochial state interpretations.*" (Emphasis added).

Or in *U. S.* v. *Pink,* 315 U. S. 203, 232 (1941):

> "Here, we are dealing with an *exclusive federal function.* If state laws and policies did not yield before the exercise of the external powers of the United States, then our foreign policy might be thwarted. These are delicate matters." (Emphasis added.)

See also Henkin, *The Foreign Affairs Power of the Federal Courts; Sabbatino* 64 Colum. L. R. 805, 811 (1964); and Keefe, *International Conflicts of Laws,* 50 A.B.A.J. 593, 595 (1964).

Nor is the holding of this Court that foreign affairs is to be treated *solely* as a matter of federal law unique or surprising. This Court has often held that matters of exceptional federal concern fall within small enclaves of exclusive federal law. *Banco Nacional de Cuba* v. *Sabbatino,* 376 U. S. 398, 426; *Clearfield Trust Co.* v. *U. S.,* 318 U. S. 363; *Hinderlider* v. *LaPlatta River Co.,* 304 U. S. 92, 110; and Friendly, *In Praise of Erie—and The New Federal Common Law,* 19 Record of the N.Y.C. B.A. 64, 83-92 (1964). Matters involving the conduct of foreign affairs are conducted solely by the federal government and within its sole domain. U. S. Constit. Art. VI.

The assumption of the Court of Appeals that *in rem* jurisdiction is available, conflicting as it does with the commandments of this Court, subjects foreign states, and, our foreign policy, to far more harassment and difficulty than does a rule of uniform federal *in personam* jurisdiction. Under the Court of Appeals' decision, foreign

states are subjected to 50 different procedures to acquire jurisdiction; 50 different methods of attachment; 50 different interpretations of "commercial property" and the decision below replaces the close adherence of our federal courts to policies of the Department of State, under the unifying control of this Court, to 50 different state reactions to our national foreign policy. As noted in Leonard, *The United States as a Litigant in Foreign Courts*, 1958 Proc. American Soc. of Int. Law, 95, 98 (April 1958):

> "The desirability of a *uniform* rule in this field is apparent. The essential element is notice to a sufficiently high echelon of the government concerned, so that prompt and effective action can be taken."

Respondents admit that the Consul gave prompt notice (JA 10).

Moreover, the difficulties of only allowing state *in rem* proceedings are already visiting themselves upon foreign governments. In *U. S.* v. *Harris & Co. Advertising, Inc.*, 149 So. 2d 384 (Dist. Ct. of App. Fla. 1963), it was held that a foreign government had entered its plea of sovereign immunity too late to prevent the execution upon its property. The Court held that the government's plea of sovereign immunity, supported by the Department of Justice *and the Department of State*, would not be accepted.

Under the decision of the Court of Appeals, the ability to bring suit against foreign sovereigns is torn between conflicting evils of either not being able to obtain jurisdiction or of relegating our foreign affairs to "parochial" and "divergent" attitudes of State courts and Statutes.

III.

THE DECISION OF THE COURT BELOW IS NOT SUPPORTED BY AUTHORITY.

The decisions cited by the Court of Appeals do not compel or support the result that was reached in the decision below.

The Court placed its primary reliance on *Oster* v. *Dominion of Canada*, 144 F. Supp. 746 (N.D. N.Y. 1956), *Aff'd per curiam* 238 F. 2d 400, *cert. den.*, 353 U. S. 936. That case involved a suit for damages resulting from the maintenance of a dam by the Canadian government along the New York-Canada border. Service was attempted by leaving a summons with the Canadian Consul at the Canadian Consulate in New York City. This service was held insufficient because the authority of the Consul was "limited by the terms [of his appointment] to the protection of the interests of the Canadian citizens within his consular district." In essence the sole contact with the suit of the Canadian Consul in *Oster* was the purely fortuitous circumstances of receiving service in an action in which he had no other involvement.

The position of the Argentine Consul in Chicago is very different. The very terms of the purchase order upon which suit is brought required that he approve documents as a *condition prerequisite* to final performance. In fact it was the Argentine Consul in Chicago who, in a continuous series of meetings examined, approved, and modified the documents as the contract required. (JA 17, 18).

The decision in *Oster* has been the subject of much criticism (Niehauss, *Comments, International Law-Sovereign Immunity—The First Decade of the Tate Letter Policy*, 60 Mich. L. R. 1142 [1962]), but it is clear that

whatever doubtful validity *Oster* may have to the factual situation there involved, that case should have no application to the entirely different situation at bar.

It should also be noted that *Oster* involved no commercial dealings on the part of the Canadian government. This Court has observed that while a foreign consul has no authority to act in sovereign matters [the operation of a dam], as the commercial representative of his government, he has *commercial* authority. As stated in *The Anne,* 3 Wheat 434, 445 (1818):

> "A consul, though a public agent, is supposed to be clothed with *authority only for commercial purposes.*" (Emphasis added.)

In Lee, *Consular Law and Practice,* N. Y. (1961), 59, it is stated that:

> "A consul performs only *actes de gestion* including a state's undertakings of *commercial* activities;".

Moreover, in *Oster* the Canadian government presented to the Court a copy of the Consul's authority showing that his duties were in no way related to the management of the dam at issue in the suit. In the instant case, Argentina has clearly admitted that the "authority" of its consular officers extends to commercial matters (JA 11).

In Re Herman's Estate, 159 Minn. 274, 198 N.W. 1001 (1924) involved probate of a will of a foreign national, not commercial transactions, in which the Consul acted.

Because of the *commercial* status of the Consul and the fact that suit is being brought in a *commercial* activity, particularly when it is one in which the Consul participated, it has been suggested by many authorities that it is appropriate and proper to make the Consul

the recipient of process in commercial suits. Concluding that the limitations placed on the authority of a Consul to receive Service in connection with commercial suits is self-imposed and not compelled by international law, Dean Griffin states:

> "*There is nothing in a Consul's situation, status or limitation of authority by his own government which makes it improper or inappropriate for the receiving state [United States] to adopt a rule treating him as the agent of his government for the purpose of considering that notice to him shall be considered notice to his government of suits against it.*" Griffin, *Adjective Law and Practice in Suits Against Foreign Governments,* 36 Temple Law Quarterly 1, 10 (1962). (Emphasis added.)

See also, Niehauss, *Comments International Law—Sovereign Immunity—The First Decade of the Tate Letter Policy,* 60 Mich. Law Rev. 1142, 1152 (1962):

> "The requirements of service of process should be relaxed so that it would be easier to impart legal notice to a foreign sovereign. *The most logical solution would seem to be one that allows service of process on the Consul General who, presumably represents the commercial interests of his country abroad.*" (Emphasis added.)

This Court certainly has the ability to remove any imagined self-imposed limitation so as to enable the ever increasing number of private firms dealing with sovereign states to obtain redress in the courts.

Petitioner respectfully submits that the great distinction between sovereign authority and commercial authority—a distinction not considered or discussed by the Court below, sufficiently demonstrates that the cases cited by that court are non-controlling or persuasive to a de-

cision of this import. The Consul's main function of representing his nation's interests in a commercial suit, which he rendered in the instant suit, renders him appropriate to receive service of process in commercial cases.

IV.

THIS IMPORTANT AREA OF FEDERAL LAW IS IN NEED OF IMMEDIATE SUPERVISION AND CLARIFICATION BY THIS COURT.

Petitioner notes that since the enunciation of the Tate policy this Court has *never* passed upon the means by which that policy may be implemented. The area has many problems having important effects both upon our foreign commerce and foreign relations (as noted in the above discussion). This important area of federal law calls for the immediate application of this Court's judgment so that some guide lines may be established by which businessmen may obtain protection in their commercial dealings with foreign sovereigns. Our commercial trading with foreign states is increasing. This is the first case to come before this Court in which *in personam* jurisdiction is sought in a solely commercial matter involving the protection of the Tate Letter. Petitioner respectfully requests that this Court lend the weight of its authority to eliminate the tangled web left by the Court of Appeals' decision.

V.

THE DECISION OF THE COURT OF APPEALS IS IN CONFLICT WITH THE ILLINOIS AUTHORITIES.

Assuming, for purposes of argument only, that this Court should still consider that *in personam* jurisdiction was not obtained by serving the Argentine Consul, petitioner would still respectfully submit that the Court of

Appeals ignored appropriate decisions of the Illinois courts which are sufficient to establish jurisdiction over DGFM pursuant to extraterritorial service. Section 17 (a)(1) of Chapter 110, Ill. Rev. Stats., subjects foreign defendants to jurisdiction if they transact business within Illinois. The Illinois decisions are quite clear that that statute is to be construed in its full constitutional expanse. *Gray* v. *American Radiator & Sanitary Corp.*, 22 Ill. 2d 429; 176 N.E. 2d 761; 79 (1961); and Jenner & Tone, *Historical and Practice Notes to the Illinois Civil Practice Act*, 110 Smith-Hurd Ill. Annot. Stats. following Section 17 (1956) and (1962). DGFM, a department of the Argentine government which maintains a Consulate within Illinois, purposely rendered payments to petitioner in Illinois by means of a Letter of Credit deliberately established upon an Illinois bank invoking the protections of the Illinois law. DGFM further required that before payment could be rendered approval must be obtained from the Argentine Consul. That approval was in fact obtained from the Argentine Consul in Chicago at the Consulate in that city. The deliberate invoking of the protections of Illinois law is effective to obtain jurisdiction. *Hansen* v. *Denckle*, 357 U. S. 235 (1957). Under the announced intent of the Illinois statute the extraterritorial service should be deemed valid and the Court of Appeals decision reversed.

CONCLUSION.

The decision of the Court of Appeals that *in personam* service upon the Argentine Consul was not effective is an unduly restrictive and erroneous interpretation of the important Tate Letter. This decision frustrates the

policy of the Department of State of allowing suits against foreign states breaching their commercial obligations because it leaves no way to obtain jurisdiction against a foreign sovereign. Use of state *in rem* procedures conflict with the holding of this Court that foreign relations are subject to only federal law. Furthermore, the decision of the Court of Appeals in this important area of federal law is not supported by any authority. This important area of federal law is in need of clarification.

Alternatively, the service made upon DGFM in Buenos Aires was effective under state law.

For the foregoing reasons, petitioner respectfully requests that this Honorable Court grant a Writ of Certiorari to review the decision of the Court of Appeals for the Seventh Circuit

Respectfully submitted

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APPENDIX A.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 14526 SEPTEMBER TERM, 1963—APRIL SESSION, 1964

THE PURDY COMPANY,
Plaintiff-Appellant,
v.
ARGENTINA, a foreign state, and DIRECCION GENERAL DE FABRICACIONES MILITARES OF ARGENTINA,
Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

June 11, 1964

Before SCHNACKENBERG, CASTLE and SWYGERT, *Circuit Judges.*

CASTLE, *Circuit Judge.* The Purdy Company, plaintiff-appellant, brought suit in the District Court against Argentina and Direccion General DeFabricaciones Militares of Argentina,[1] defendants-appellees, to recover monies allegedly due under a contract for the sale and delivery of steel scrap. The contract, made in Buenos Aires, Argentina, called for delivery of the steel at Buenos Aires consigned to DGFM. It contains a "Manner of Payment" clause requiring DGFM to establish a letter of credit upon

[1] An Argentine corporation, referred to herein as DGFM. The complaint alleges that Argentina made the contract here involved "by and through" DGFM "a department of the government" of Argentina through which Argentina owns and operates the steel manufacturing industry of that country.

the First National Bank of Chicago in favor of plaintiff. Conditions precedent to payment include presentation of the following documentation:

"(1) Complete set of Bills of Lading, issued on the basis of a freight contract, listing the goods aboard and below deck, freight prepaid (Original and two copies).

(2) Commercial Invoice, in quadruplicate (Original and Duplicate) establishing the C. & F. value of the goods in Buenos Aires, duly legalized by an Argentine Consul.

(3) Argentine Consular Invoice, in triplicate, duly legalized."

The record discloses that DGFM established the letter of credit and that plaintiff furnished the required documents which were "legalized" or authenticated by the Argentine consul at Chicago, Illinois.

Summonses to each of the defendants were served on the Argentine consul at Chicago. This service was quashed as to DGFM and an alias summons was then issued and served on DGFM at Buenos Aires. Such service was also quashed on the motion of DGFM and thereafter DGFM was dismissed as a party to the action. A default judgment entered against Argentina was vacated on its special and limited appearance and motion to quash the service of process and to dismiss. The service on Argentina was quashed and the action dismissed.

Plaintiff's appeal from the judgment orders vacating the default judgment against Argentina, quashing the service of the summonses, and dismissing the action precipitates two main contested issues:

(1) Whether service upon the Argentine consul at Chicago conferred *in personam* jurisdiction over Argentina, a sovereign foreign state, and such jurisdiction over DGFM.

(2) Whether extra-territorial service of summons on DGFM at Buenos Aires was effective to obtain *in personam* jurisdiction over DGFM.

Plaintiff contends that the function performed by the Argentine consul at Chicago in authenticating the documents required to be presented as a condition of payment made the consul an agent of his government and of DGFM for the purpose of service of process and that the establishing of the letter of credit on the Illinois bank and payments made thereunder on authentication of the documents in Illinois constituted transaction of business in Illinois so as to authorize the extra-territorial service of summons on DGFM at Buenos Aires under the provisions of Rules 4(f) and 4(d)(7) of the Federal Rules of Civil Procedure (28 U.S.C.A.) and Section 17(1)(a) of the Illinois Civil Practice Act (Ill. Rev. Stat. 1963, ch. 110, § 17(1)(a)).

In connection with its contention that the service of summons on the Argentine consul was effective to obtain jurisdiction over Argentina the plaintiff urges that the purely commercial nature of the transaction involved calls for application of the restrictive immunity doctrine—the doctrine underlying the policy of the Department of State, as expressed in the "Tate Letter",[2] of not suggesting to the courts that a sovereign be granted immunity from suit where the action arises out of commercial activities of the foreign state. Plaintiff asserts that unless the foreign nation's consul is recognized as its agent for the service of process in such actions the doctrine of restrictive immunity would be rendered meaningless since no action would ever be maintainable without first obtaining the consent of the sovereign. The conclusion plaintiff thus attempts to draw overlooks the area in which the doctrine otherwise can have full recognition and application—cases in which *in rem* jurisdiction exists

[2] 26 Dept. State Bull. 984-985 (1952). In this connection it is noted that the record indicates that the instant suit was brought to the attention of the State Department and a claim of sovereign immunity asserted. But the record discloses no intervention by the State Department suggesting that immunity from the suit be granted.

and those situations in which the foreign state invokes jurisdiction of the court and thereby subjects itself to a counterclaim to which the doctrine is applicable. Moreover, the issue here is one of acquisition of jurisdiction, not that of a limitation on a release from jurisdiction already acquired in recognition of privilege accorded a sovereign foreign state. We perceive no relevance of the doctrine of restrictive immunity to the issue here involved.

Apart from the fact that Rule 4 of the Federal Rules of Civil Procedure makes no provision for service upon a foreign government, it is recognized that a foreign consul is not by virtue of his office an agent of the government he represents, or of its citizens whom he may serve, for the purpose of service of process. *Oster* v. *Dominion of Canada,* (N.D. N.Y. 1956), 144 F. Supp. 746, aff. 238 F. 2d 400, cert. den., 353 U.S. 936; *In Re Herman's Estate,* 159 Minn. 274, 198 N.W. 1001. In *Oster* it was held that service on a consul is not effective to obtain *in personam* jurisdiction over the sovereign state he represents. And in *Herman* it was pointed out that the functions of a consul in the protection of the interests of the citizens of the country he represents do not, in the absence of specific authorization, constitute him their agent for service of process.

The Argentine consul at Chicago was not by law or specific appointment the agent of either of the defendants for service of process. He was but the particular Argentine consul selected by the plaintiff, pursuant to the contract, to perform a normal routine duty of a consul in authenticating the documents required to be presented in connection with obtaining payment under the contract's provisions. The record does not support a conclusion that the consul became an agent of DGFM for the purpose of service of process. The service on the consul did not confer *in personam* jurisdiction over either of the defendants and the District Court did not err in quashing that service.

We turn to consideration of whether the extra-territorial service made on DGFM in Buenos Aires was effec-

tive to confer *in personam* jurisdiction over that defendant. Plaintiff contends, in substance, that by establishing the letter of credit with the Illinois bank for the purpose of paying the purchase price in performance of its part of the contract, and in requiring that the bills of lading and invoices to be presented as conditions precedent to such payments be "duly legalized" by an Argentine consul, DGFM supplied prerequisite minimal contacts in the transaction of business in Illinois which subject DGFM to the jurisdiction of the District Court. Rules 4(f) and 4(d)(7) of the Federal Rules of Civil Procedure recognize the validity of extra-territorial service made in the manner prescribed by a valid enactment of the state in which the district court is held. And plaintiff relies upon Section 17(1)(a) of the Illinois Civil Practice Act, which authorizes extra-territorial service where the cause of action arises from the person's "transaction of any business" within Illinois, as authorizing the service made on DGFM in Buenos Aires. We have had occasion to point out that although the Illinois statute has widened considerably the bases for service on non-resident defendants in *in personam* suits there still remain important limitations on a state's power to extend jurisdiction beyond its territorial limits. *Trippe Manufacturing Company* v. *Spencer Gifts, Inc.*, 7 Cir., 270 F. 2d 821, 822-823. See also: *Schmidt* v. *Esquire, Inc.*, 7 Cir., 210 F. 2d 908; *National Gas Appliance Corp.* v. *AB Electrolux*, 7 Cir., 270 F. 2d 472; *Insull* v. *New York World-Telegram Corporation*, 7 Cir., 273 F. 2d 166; and *Edwin Raphael Company, Inc.* v. *Maharam Fabrics Corporation*, 7 Cir., 283 F. 2d 310 in which the scope and application of the Illinois statute was considered and the "minimal contacts" requirement of due process recognized.

Likewise, the Illinois Supreme Court in *Grobark* v. *Addo Machine Co., Inc.*, 16 Ill. 2d 426, 158 N.E. 2d 73, in keeping with the rationale of *Hanson* v. *Denckla*, 357 U.S. 235, has in construing the "transaction of any business within this State" provision of the statute held that sales of machines over an extended period by a New

York corporation to an Illinois dealer, appointed its exclusive distributor for a designated area, did not make the corporation amenable to extra-territorial service in a suit by the dealer. It was pointed out that the New York corporation was not licensed to do business in Illinois; maintained no office in Illinois; had no officers, agents or employees within the state; and that the relationship between the plaintiff and the corporation was purely one of purchaser and seller. It was held that the corporation did not have the "minimal contacts" requisite to subject it to the jurisdiction of the Illinois courts—that it was not transacting business in Illinois.

In our opinion *Grobark* is controlling in the instant case. In so far as the record discloses DGFM maintains no contacts with Illinois and the contract involved represents but an isolated transaction in which the relation between DGFM and the plaintiff is merely that of purchaser and seller. The arrangement to make the contract payments through utilization of a letter of credit on an Illinois bank and to require plaintiff to secure consular authentication of the bills of lading and invoices to be presented as conditions precedent to payment does not in our opinion constitute the transaction of business in Illinois by DGFM within the meaning and purpose of the statute here involved or supply the "minimal contacts" essential to a valid assertion of extra-territorial jurisdiction. A non-resident purchaser from an Illinois vendor, without other contact with Illinios, is not by reason of such payment device subjected to jurisdiction of the Illinois courts and thus made amenable to extra-territorial service of process.

Nothing in the record before us discloses that DGFM has purposefully availed itself of "the privilege of conducting activities within the forum state, [Illinois] thus invoking the benefits and protection of its laws". *Hanson* v. *Denckla*, 357 U.S. 235, 253. The District Court did not err in quashing the extra-territorial service on DGFM.

Jurisdiction over the persons of the defendants was not acquired by the service of process here made and since there appears to be no chance of curing the defect by proper service of process it was not error to dismiss the action. *Oster* v. *Dominion of Canada, supra.*

The judgment orders of the District Court appealed from are affirmed.

AFFIRMED.

UNITED STATES COURT OF APPEALS
For The Seventh Circuit
Chicago 10, Illinois
Thursday, June 11, 1964
Before

Hon. Elmer J. Schnackenberg, Circuit Judge
Hon. Latham Castle, Circuit Judge
Hon. Luther M. Swygert, Circuit Judge

THE PURDY COMPANY,
Plaintiff-Appellant,
vs.
ARGENTINA, a foreign state, and DIRECCION GENERAL DE FABRICACIONES MILITARES OF ARGENTINA,
Defendants-Appellees.

No. 14526

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment orders of the said District Court in this cause appealed from be, and the same are hereby, AFFIRMED, with costs, in accordance with the opinion of this Court filed this day.

UNITED STATES COURT OF APPEALS
For The Seventh Circuit
Chicago 10, Illinois
Tuesday, July 14, 1964
Before

Hon. Elmer J. Schnackenberg, Circuit Judge
Hon. Latham Castle, Circuit Judge
Hon. Luther M. Swygert, Circuit Judge

THE PURDY COMPANY,
Plaintiff-Appellant,
No. 14526 vs.
ARGENTINA, a foreign state, and DIRECCION GENERAL DE FABRICACIONES MILITARES OF ARGENTINA,
Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

It Is Ordered by the Court that the petition for a rehearing of this cause filed by plaintiff-appellant be, and the same is hereby,

DENIED.

APPENDIX B.

TATE LETTER

20 Dept. State Bull., 984 (1952)

May 19, 1952.

My Dear Mr. Attorney General:

The Department of State has for some time had under consideration the question whether the practice of the Government in granting immunity from suit to foreign governments made parties defendant in the courts of the United States without their consent should not be changed. The Department has now reached the conclusion that such immunity should no longer be granted in certain types of cases. In view of the obvious interest of your Department in this matter I should like to point out briefly some of the facts which influenced the Department's decision.

A study of the law of sovereign immunity reveals the existence of two conflicting concepts of sovereign immunity, each widely held and firmly established. According to the classical or absolute theory of sovereign immunity, a sovereign cannot, without his consent, be made a respondent in the courts of another sovereign. According to the newer or restrictive theory of sovereign immunity, the immunity of the sovereign is recognized with regard to sovereign or public acts (*jure imperii*) of a state, but not with respect to private acts (*jure gestionis*). There is agreement by proponents of both theories, supported by practice, that sovereign immunity should not be claimed or granted in actions with respect to real property (diplomatic and perhaps consular property excepted) or with respect to the disposition of the property of a deceased person even though a foreign sovereign is the beneficiary.

The classical or virtually absolute theory of sovereign immunity has generally been followed by the courts of

the United States, the British Commonwealth, Czechoslovakia, Estonia, and probably Poland.

The decisions of the courts of Brazil, Chile, China, Hungary, Japan, Luxembourg, Norway, and Portugal may be deemed to support the classical theory of immunity if one or at most two old decisions anterior to the development of the restrictive theory may be considered sufficient on which to base a conclusion.

The position of the Netherlands, Sweden, and Argentina is less clear since although immunity has been granted in recent cases coming before the courts of those countries, the facts were such that immunity would have been granted under either the absolute or restrictive theory. However, constant references by the courts of these three countries to the distinction between public and private acts of the state, even though the distinction was not involved in the result of the case, may indicate an intention to leave the way open for a possible application of the restrictive theory of immunity if and when the occasion presents itself.

A trend to the restrictive theory is already evident in the Netherlands where the lower courts have started to apply that theory following a Supreme Court decision to the effect that immunity would have been applicable in the case under consideration under either theory.

The German courts, after a period of hesitation at the end of the nineteenth century have held to the classical theory, but it should be noted that the refusal of the Supreme Court in 1921 to yield to pressure by the lower courts for the newer theory was based on the view that that theory had not yet developed sufficiently to justify a change. In view of the growth of the restrictive theory since that time the German courts might take a different view today.

The newer or restrictive theory of sovereign immunity has always been supported by the courts of Belgium and Italy. It was adopted in turn by the courts of

Egypt and of Switzerland. In addition, the courts of France, Austria, and Greece, which were traditionally supporters of the classical theory, reversed their position in the 20's to embrace the restrictive theory. Rumania, Peru, and possibly Denmark also appear to follow this theory.

Furthermore, it should be observed that in most of the countries still following the classical theory there is a school of influential writers favoring the restrictive theory and the views of writers, at least in civil law countries, are a major factor in the development of the law. Moreover, the leanings of the lower courts in civil law countries are more significant in shaping the law than they are in common law countries where the rule of precedent prevails and the trend in these lower courts is to the restrictive theory.

Of related interest to this question is the fact that ten of the thirteen countries which have been classified above as supporters of the classical theory have ratified the Brussels Convention of 1926 under which immunity for government owned merchant vessels is waived. In addition the United States, which is not a party to the Convention, some years ago announced and has since followed, a policy of not claiming immunity for its public owned or operated merchant vessels. Keeping in mind the importance played by cases involving public vessels in the field of sovereign immunity, it is thus noteworthy that these ten countries (Brazil, Chile, Estonia, Germany, Hungary, Netherlands, Norway, Poland, Portugal, Sweden) and the United States have already relinquished by treaty or in practice an important part of the immunity which they claim under the classical theory.

It is thus evident that with the possible exception of the United Kingdom little support has been found except on the part of the Soviet Union and its satellites for continued full acceptance of the absolute theory of sovereign immunity. There are evidences that British authorities are aware of its deficiencies and ready for a

change. The reasons which obviously motivate state trading countries in adhering to the theory with perhaps increasing rigidity are most persuasive that the United States should change its policy. Furthermore, the granting of sovereign immunity to foreign governments in the courts of the United States is most inconsistent with the action of the Government of the United States in subjecting itself to suit in these same courts in both contract and tort and with its long established policy of not claiming immunity in foreign jurisdictions for its merchant vessels. Finally, the Department feels that the widespread and increasing practice on the part of governments of engaging in commercial activities makes necessary a practice which will enable persons doing business with them to have their rights determined in the courts. For these reasons it will hereafter be the Department's policy to follow the restrictive theory of sovereign immunity in the consideration of requests of foreign governments for a grant of sovereign immunity.

It is realized that a shift in policy by the executive cannot control the courts but it is felt that the courts are less likely to allow a plea of sovereign immunity where the executive has declined to do so. There have been indications that at least some Justices of the Supreme Court feel that in this matter courts should follow the branch of the Government charged with responsibility for the conduct of foreign relations.

In order that your Department, which is charged with representing the interests of the Government before the courts, may be adequately informed it will be the Department's practice to advise you of all requests by foreign governments for the grant of immunity from suit and of the Department's action thereon.

Sincerely yours,

For the Secretary of State:

Jack B. Tate
Acting Legal Adviser

INDEX

	Page
Opinions Below	1
Jurisdiction	1
Questions Presented	2
Statute Involved	2
Statement	2
Argument	5
I. The Decision Below Is Clearly Correct	7
A. Service Upon the Argentine Consul	8
B. Service in Buenos Aires	10
II. There Is No Conflict of Decisions	11
III. There Is No Important Question of Federal Law	12
Conclusion	13

CITATIONS

CASES:

Gray v. American Radiator & Sanitary Corporation, 22 Ill. 2d. 429, 176 N.E. 2d. 761 (1961)	10
Grobark v. Addo Machine Company, 16 Ill. 2d. 426, 158 N.E. 2d. 73 (1959)	11
Oster v. Dominion of Canada, 144 F. Supp. 746 (N.D. N.Y. 1956), 238 F. 2d. 400, cert. den. 353 U.S. 936	8, 9
Puente v. Spanish National State, 116 F. 2d. 43 (2 Cir. 1940), cert. den. 314 U.S. 627	8
Saletko v. Willys Motors Inc., 36 Ill. App. 2d. 7, 183 N.E. 2d. 569 (1962)	11
The Anne, 3 Wheat. 435 (1818)	8
The Sao Vincinte, 260 U.S. 151 (1922)	8

STATUTES:

Illinois Civil Practice Act, Section 17(1)(a), Illinois Rev. Stat., Ch. 110, Sec. 17(1)(a) (1964)	2, 3, 6, 10

MISCELLANEOUS:

Federal Rules of Civil Procedure, Rule 4	8
Tate Letter, 20 Dep. State Bull. 984 (1952)	5, 6, 7, 9

IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 582

THE PURDY COMPANY, *Petitioner,*

v.

ARGENTINA, a foreign state, and DIRECCION GENERAL FARICACIONES MILITARES OF ARGENTINA, *Respondents.*

BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinions of the District Court are not reported. Copies of the orders are printed at pages 20, 22, 26, 27, 37-38 and 39 of the Joint Appendix. The Opinion of the Court of Appeals for the Seventh Circuit (Petition, Appendix A) is reported at 333 F. 2d. 95.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTIONS PRESENTED

1. Can service upon an Argentine consul in the United States, who is not appointed as agent, confer upon a United States District Court *in personam* jurisdiction over the Government of Argentina or an Argentine Corporation?

2. Was the court below correct in holding that, under the facts of this case and the Illinois case law, Section 17(1)(a) of the Illinois Civil Practice Act, which authorizes extraterritorial service on any person transacting any business within Illinois, did not permit valid service upon an Argentine Corporation?

STATUTE INVOLVED

The pertinent provisions of the Illinois Civil Practice Act, Section 17(1)(a), Chapter 111, Ill. Rev. Stats., Sec. 17(1)(a) (1964) are set forth in the Petition at p. 3.

STATEMENT

This litigation concerns the attempts of Petitioner, The Purdy Company, an Illinois Corporation, to bring an *in personam* action in the State of Illinois against Respondents, The Republic of Argentina (Argentina) and Direccion General Fabricaciones Militares of Argentina (D.G.F.M.), an Argentine corporation.

The validity of two purported services of process was at issue below.

The complaint, filed in the District Court for the Northern District of Illinois, Eastern Division, on August 30, 1966, sought damages of some $87,000 for the alleged breach of a sales contract between Petitioner and D. G. F. M., negotiated and executed in

Buenos Aires, Argentina, November 14, 1956. Argentina was not a party to the contract, but the complaint stated that Argentina owned D.G.F.M. and operated by and through it.

The first purported service of process was made September 1, 1960, on both Respondents, by delivery of summonses to the Argentine Consul in Chicago. A second service was attempted upon Respondent D.G.F.M. only, in Buenos Aires, Argentina, on November 5, 1962.

Neither Respondent had offices, officers, directors or duly appointed agents within Illinois, and thus validity of the service upon the Argentine Consul in Chicago was dependent upon proof that he was Respondents' agent for receipt of process. The extraterritorial service in Argentina could be justified only by submission to jurisdiction under the terms of the Illinois Civil Practice Act.[1] Petitioner relied upon the sales contract with Respondent D.G.F.M., the opening of a letter of credit with a Chicago bank, and the routine functions of the Argentine Consul in processing shipping documents both to establish the Consul's agency and to demonstrate the transaction of business in Illinois. Apart from these three facts, there were no other "contacts" between the parties or between Respondents and the State of Illinois. There was no established pattern of business in Illinois, and the subject transaction was the only one between the parties.

After the complaint was filed, Respondent D.G.F.M. entered a special appearance and moved to dismiss on grounds of the lack of *in personam* jurisdiction. On June 21, 1961, the District Court dismissed the com-

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[1] Section 17(1)(a), Ill. Rev. Stats., Ch. 110 (1964) "The transaction of any business within this state . . . ."

plaint as against Respondent D.G.F.M., but thereafter limited the order to quashing the summons and return, and the clerk was instructed to issue an alias summons directed to each of the Respondents. Two more orders were entered authorizing alias summons and appointing a process server. The first and only return of service on the alias summons was filed December 5, 1962. It purported to show service upon Respondent D.G.F.M. on November 5, 1962, in Buenos Aires, Argentina.

Respondent D.G.F.M. on December 21, 1962, filed a motion to quash service of process and to dismiss. The District Court granted the motion, stating:

> "... The Court finding that the defendant was not doing business in the State of Illinois within the meaning of Section 17(1)(a) of the Illinois Civil Practice Act ... the motion to quash the said purported service of summons be and it is hereby sustained."

On June 4, 1963, the cause again came before the court and an order was entered dismissing D.G.F.M. as a party.

On September 12, 1963, a default judgment in the amount of $86,909.77 was entered against Respondent Argentina, on the ground that it had failed to file an answer or otherwise defend.

Respondent Argentina entered a special appearance for the limited purpose of contesting *in personam* jurisdiction over it. Motions were filed to stay execution, to set aside the default, to quash service of process and to dismiss. An order was entered staying execution, and after exchange of briefs, the District Court, on November 15, 1963, entered an order quashing serv-

ice of process on Respondent Argentina and dismissing the case.

On June 11, 1964, the United States Court of Appeals for the Seventh Circuit affirmed the judgment orders of the District Court. Rehearing was denied on July 14, 1964.

ARGUMENT

There are no valid reasons for further review of this case. The questions presented are uncomplicated and routine. Stripped of rich verbiage and exhortation regarding the law of nations and foreign relations, which are not involved in this case, the issues are simple. They concern the acquisition of *in personam* jurisdiction as the result of two purported services of process: (1) Whether under the Federal Rules of Civil Procedure valid service was accomplished upon the Republic or Argentina or an Argentine corporation by delivery of process to the Argentine Consul in Chicago, and (2) Whether *in personam* jurisdiction was obtained by extraterritorial service on the corporate Respondent in the manner provided by the Illinois Civil Practice Act?

Petitioner urges that the decision below denying valid service frustrates a policy of the United States Department of State established by the so-called *Tate Letter*. (20 Dpt. Stat. Bull. 984, 985 (1952)). This letter states that the Department will no longer issue suggestions of sovereign immunity regarding the commercial or private acts (*jure gestionis*) of foreign governments.

The changed policy set forth in the letter is as irrelevant to this case as the former policy of the Department of State or in fact the policies of any other de-

partment of the Executive branch. The issues here relate to the acquisition of jurisdiction by service of process complying with the Federal Rules of Civil Procedure and/or with the Illinois Civil Practice Act. Nothing herein involves the relinquishment of jurisdiction because of the sovereign immunity of the foreign government defendant. Sovereign immunity, which was the subject of the *Tate Letter,* was not a basis of the decisions below and certainly it is irrelevant here.

There is no provision in the Federal Rules of Civil Procedure authorizing service upon a foreign sovereign. Thus, the first service, which was made upon the Argentine Consul in Chicago, can be valid only if the Consul was a proper agent of Respondents. There was no specific appointment, nor can an agency relationship be established on common law principles.

Petitioner must rely upon the sales contract between it and Respondent D.G.F.M. However, the contract does not contain a specific appointment of an agent. It is a routine international sales contract. The facts do not establish an agency for purposes of service of process and the courts below so found.

Validity of the extraterritorial service is dependent upon Section 17(1)(a) of the Illinois Civil Practice Act. The courts below found that the facts did not meet the statutory standard, ". . . transaction of any busines within . . ." Illinois, and thus that *in personam* jurisdiction could not be obtained by extraterritorial service.

The decision below was manifestly correct. Petitioner's assertions of conflict are not of the kind specified in Rule 19. Conflicts between the policies of the

Departments of Justice and State (Petition, p. 10) if any there be, are hardly appropriate for review. No decisions of this Court, or any other court, holding that effective service may be obtained upon a foreign government by delivery of process to one of its Consuls have been cited. The assertions of conflict, at most, amount to arguments that the decisions below were incorrect. There is no important question of Federal law requiring decision by this Court. Standards for effective service under the Federal Rules of Civil Procedure are completely covered by numerous decisions of this Court and the lower federal courts. The alleged extraterritorial service is dependent upon an interpretation of an Illinois statute, and the decision below is in accord with the Illinois cases.

I

THE DECISION BELOW IS CLEARLY CORRECT

The great bulk of the Petition is devoted to arguments that the decisions below were incorrect. Although not so headed, Sections I, II, III and V are arguments that the Court of Appeals erred. The Petition uses the *Tate Letter* again and again in an attempt to create conflicts and arguments which have no place in this case. Much as the Petition may argue to the contrary, the policy expressed in this letter, and any issues which may arise from its application or non-application, are absolutely irrelevant to this case. The issues here concern the acquisition of *in personam* jurisdiction by effective service of process in accordance with the Federal Rules of Civil Procedure and or the Illinois Civil Practice Act.

The *Tate Letter* did not purport to, and could not have changed, the law regarding the acquisition of

jurisdiction over a foreign sovereign. There are no public pronouncements of the Departments of State or Justice to support the concept that the "intent of the Department of State must be to allow *in personam* jurisdiction, . . ." to be acquired by service upon consular officers. (Petition, p. 11) The cases cited in the Petition are not in point; they deal with freedom of a foreign sovereign's property from execution or acquisition of jurisdiction by attachment.

A

Service Upon The Argentine Consul

The Petition argues, in Section III, that the decision of the court below is not supported by authority. This assertion, which is directed to the validity of service upon the Argentine Consul in Chicago, simply is not accurate. The fundamental point is that the Federal Rules of Civil Procedure do not contemplate *in personam* service upon a foreign sovereign. Rule 4 covers a wide range of potential defendants, but there is no reference to a foreign government. *Oster* v. *Dominion of Canada*, 144 F. Supp. 746 (N.D. N.Y. 1956), 238 F. 2d. 400, cert. den. 353 U.S. 936; *The Anne*, 3 Wheat. 435 (1818); and *Puente* v. *Spanish National State*, 116 F. 2d. 43 (2 Cir. 1940), cert. den. 314 U.S. 627. The limited authority of a consul to act as the representative of his government in judicial proceedings has been recognized by this Court. *The Sao Vincinte*, 260 U.S. 151 (1922).

It is worthy of note that Petitioner cites no cases to support its argument that a consular officer is an appropriate agent for service, but merely attempts to distinguish *Oster* v. *Dominion of Canada, supra* on untenable grounds. The *Oster* case involved a tort claim;

herein a contract claim is involved. From this immaterial distinction, Petitioner attempts to argue that the consul's routine processing of the shipping documents herein amounted to "commercial dealings" which somehow gave him greater authority than that possessed by the consul in the *Oster case*. (Petition, p. 16) Whatever may be the significance of commercial acts (*jure gestionis*) within the *Tate Letter* as they relate to sovereign immunity, the point is irrelevant here. That a lawsuit is in contract rather than in tort cannot increase the authority of a Consul to accept service of process nor amend the Federal Rules of Civil Procedure.

The sales contract did not create an agency between Respondents and the Argentine Consul. The only possibly relevant part of the contract is the Manner of Payment clause which reads, in part:

> "(a) Ninety percent upon presentation of the following documentation:
>
> "(1) Complete set of Bills of Lading, . . .
>
> "(2) Commercial invoice, in quadruplicate (original and duplicate) establishing the C. & F. value of the goods in Buenos Aires, duly legalized by *an Argentine Consul* (emphasis added).
>
> "(3) Argentine Consular Invoice, in triplicate, duly legalized.
>
> "(4) Certificate of inspection . . . ." (Joint Appendix, pp. 17, 18.)

The above quotation contains the only reference to *an* Argentine *consul*, which is to be found in the entire contract, and this reference is not to *the* Argentine Consul *in Chicago*, but to *an* Argentine consul. The

selection of *an* Argentine consul from the many available in the United States was a matter within Petitioner's discretion. It could and did select *the* Argentine Consul *in Chicago* as a matter of its convenience to perform the routine function of "legalizing" (notarizing) the shipping documents.[2] Nevertheless, Petitioner would contend that *the Argentine Consul* in *Chicago* who was selected by it is an appropriate agent of Respondents' for purposes of service of process. The actions of *the* Consul selected by Petitioner in processing routine shipping documents, plus the opening of a letter of credit and payments against it, which were the only relevant facts, did not amount to an appointment of *the Argentine Consul in Chicago* as an agent of the respondents for the purposes of service.

B

Service in Buenos Aires

Under the title of "Conflict," the Petition argues in Section V that the decision is not in accord with the Illinois cases. At issue below was whether the Illinois statute,[3] providing for extraterritorial service, authorized the service made upon Respondent D.G.F.M. at its offices in Buenos Aires, Argentina. The Petition cites a single case, *Gray* v. *American Radiator & Sanitary Corporation,* 22 Ill. 2d. 429, 176 N.E. 2d. 761, (1961). This case concerned a tort committed in Illi-

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[2] Petitioner repeatedly alleges that it was a required "condition precedent" to payment that "the Argentine consul (in Chicago) duly legalize and approve invoices and other documents . . . before payment could be made." (See Petition, pp. 4, 15, 19. The word "approve" appears six (6) times on page 4.) There is absolutely no justification for these assertions.

[3] Ill. C.P.A. Sec. 17(1)(a).

nois and was decided under an entirely different and inapplicable provision of Section 17. *Saletko* v. *Willys Motors, Inc.*, 36 Ill. App. 2d. 7, 183 N.E. 2d. 569 (1962). The leading case regarding the statutory test in contract actions: ". . . the transaction of any business within this state . . . ." is *Grobark* v. *Addo Machine Company*, 16 Ill. 2d. 426, 158 N.E. 2d. 73 (1959). The court below correctly held that the *Grobark* case was controlling, citing numerous decisions in support. Thus, the Court of Appeals sustained the finding of the District Court that Respondent's acts of establishing a letter of credit with an Illinois bank, and contractually requiring that payments thereunder be made against invoices "duly legalized by *an* Argentine Consul," did not meet the standard of the Illinois statute so as to authorize the service attempted in Buenos Aires.

II

THERE IS NO CONFLICT OF DECISIONS

Petitioner attempts to create "conflicts" by alleging conflicting policies of the Departments of Justice and State (Petition, p. 10) and by citing dicta of the court below as being contrary to the decisions of this Court. Petitioner has not cited cases from other Circuit Courts of Appeals or this Court which approve the acquisition of *in personam* jurisdiction over a foreign government by either of the methods attempted herein. Patently, there is no conflict other than that created by the Petition. In fact, the decisions in point are entirely consistent.

The court below responded to Petitioner's pleas of the hardship occasioned by the decision, pointing out that jurisdiction *in rem* or upon a counter claim could

be obtained.[4] Petitioner has fastened upon this dicta and builds an illusory "conflict" upon it. It is argued in Section II of the Petition that since *in rem* jurisdiction is a matter of state law and decisions of this Court have held "that foreign affairs is to be treated *solely* as a matter of federal law . . ." there is a conflict. (Petition, p. 13) Foreign affairs is not an issue in this case, and thus if conflict there be, it is between a statement of dicta and a contrived irrelevancy.

Petitioner is completely inconsistent, even if one were to assume that the argument has substance. On the one hand it is argued that acquisition of *in rem* jurisdiction in accordance with state law conflicts with decisions of this Court. On the other hand, Section V of the Petition argues that effective jurisdiction was acquired under the Illinois state law, I.C.P.A. 17(a)(1).

III

THERE IS NO IMPORTANT QUESTION OF FEDERAL LAW

Clearly the narrow and limited issues in this case do not present an important question of Federal law. The isues are whether two alleged services of process were made in accordance with the Federal Rules of Civil Procedure or an Illinois statute. Nothing is more thoroughly established than that service in Federal Courts can only be in accordance with the Rules. The decision regarding the Illinois Civil Practice Act is supported by a long and uniform series of

[4] The court also could have noted specific appointment of an agent, or consent to jurisdiction by appearance or by contract. However, it should be noted that in this instance Petitioner in the sales contract expressly agreed to jurisdiction of the National Special Courts in the City of Buenos Aires (Joint Appendix, pp. 18-19).

opinions from the Illinois appellate courts and the Seventh Circuit Court of Appeals. Much as Petitioner may argue, there is no question here regarding sovereign immunity, foreign affairs, or the policies of the Department of State.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be denied.

Respectfully submitted,

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